NUR ALIA MOHAMAD RADZHI & ORS
v. FAZILAH ABDUL AZIZ

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL APPEAL NO: PA-12B-51-09-2019]
25 MAY 2023

Abstract – *Parents and guardians of children have utmost responsibility to be on watch of the actions of their children. They could not plead ignorance when it is their duty to take reasonable care and be in control of their children. Hence, when the children, who are minors, were out riding on motorcycles and later met with an accident, the parents are in dereliction of their duty as guardians. More so, where the facts of the case clearly established that the accident was indeed caused by minor children.*

CIVIL PROCEDURE: *Appeal – Notice of appeal – Filing of – Third party suit – Whether third parties could join in plaintiff's appeal by filing single notice of appeal – Whether appeal based on separate judgment for separate cause of action – Trial judge found no liability on part of defendant against plaintiff – Whether negated appeal by third parties – Whether notice of appeal defective and incompetent*

ROAD TRAFFIC: *Accident – Liability – Collision between motorcycle and car – Minor motorcycle rider with minor pillion riders – Suit by one pillion rider against car driver – Conflicting versions of facts – Findings that testimony for pillion rider 'inconsistent, variable, contradictory and unreasonable' and 'not corroborated by silent evidence' – Whether car driver's version of facts inherently probable – Whether car driver negligent – Apportionment of liability – Whether fair and balanced – Whether reasonable quantum awarded*

In this motor vehicle accident involving three children on a motorcycle, the rider was a 12-year-old girl with two minors as pillion. At a junction with traffic lights, while making a U-turn, they collided with a car. The plaintiff in the Sessions Court ('SC'), who filed a suit against the car driver ('defendant'), was one of the pillion riders. The defendant brought a third-party suit against the plaintiff's father ('TP1') and the father of the rider ('TP2'). The SC dismissed the plaintiff's suit, having found the defendant not liable for the accident. The plaintiff appealed to the High Court. The two third parties, TP1 and TP2, joined in on the plaintiff's appeal, wherein the three of them filed a single notice of appeal, as co-appellants. The defendant objected that the notice of appeal was defective, submitting that, as third parties, TP1 and TP2 must file separate notices of appeal; they could not join in on the plaintiff's appeal.

Held (allowing defendant's preliminary objection; dismissing plaintiff's appeal):

(1) The foundation and structure of the judgment in the suit between the plaintiff and the defendant was the plaintiff's suit for negligence against the defendant. Whereas, the foundation and structure of the judgment in the suit between the defendant and TP1 and TP2 was the third party suit between the defendant and TP1 and TP2, namely, on the issue of indemnity or contribution by TP1 and TP2 towards the liability of the defendant. Hence, TP1 and TP2 could appeal against the judgment in the suit between the defendant and TP1 and TP2, but not against the judgment in the suit between the plaintiff and the defendant. It was not proper for TP1 and TP2 to join up with the plaintiff to lodge one combined appeal. Their respective causes and suits were separate from each other. Since the SC found no liability on the part of the defendant, there was no judgment for TP1 and TP2 to appeal against. Hence, TP1 and TP2's purported appeals, which were conflated with the sole notice of appeal lodged, were defective and incompetent. (paras 26, 27, 29 & 30)

(2) TP1 and TP2 prayed for leave to appeal against the High Court's decision on liability, but the leave order stated that leave was granted to appeal against the High Court's decision on liability and quantum. When they eventually filed their notice of appeal, it stated that they were appealing against the High Court decision against them on quantum as well as on the defendant's objection against their conflated appeal. What TP1 and TP2 had done was inappropriate as the High Court judgment against TP1 and TP2 contained only the reasons for deciding that TP1 and TP2's purported appeals from the SC were defective and incompetent. The judgment did not contain any grounds that relate to dismissing TP1 and TP2's appeals from the SC. (paras 45, 48 & 52)

(3) Where there were conflicting versions of the facts of a case, the trial judge's approach was to consider which of the two conflicting versions was inherently probable. The plaintiff's version relied on the testimony of the motorcycle rider ('SP2'). The SCJ found that SP2 was 'not a credible witness' who 'obviously wanted to shift the blame' to the defendant. SP2's evidence was 'inconsistent, variable, contradictory and unreasonable' and 'not corroborated by the silent evidence'. Further, the delay by SP2 to lodge her police report did not assist the plaintiff's case as the delay 'affected the accuracy or veracity of the report'. On the other hand, the SCJ found the defendant's version to be 'inherently probable' and therefore, the defendant was not negligent, it was SP2 who caused the accident that resulted in the plaintiff's injuries (paras 64, 72-74, 76 & 88)

(4) The effect of the SCJ's finding that the plaintiff was 25% 'liable', TP1 was 25% liable and TP2 was 50% liable for the plaintiff's injuries, was that, the defendant was not at all liable to the plaintiff in the plaintiff's suit against the defendant. The SCJ's apportionment of liability did not make the SCJ's judgment 'plainly wrong'. The SCJ weighed and evaluated all the surrounding circumstances on how the car collided with the motorcycle at an angle. The SCJ's appreciation of the evidence and the surrounding factors was fair and balanced. (paras 107 & 111-113)

(5) The SCJ's judgment on quantum was reasonable. The SCJ set out a comparison table of the amount prescribed by the Compendium, the amount proposed by the plaintiff and the amount proposed by the defendant, for each of the five 'headings of injury'. The SCJ awarded (i) RM9,000 for bilateral eyes periorbital haematoma, left eye traumatic mydriasis, chemosis of both eyes; (ii) RM33,000 for multiple skull bone fractures; (iii) RM70,000 for multiple head injuries; (iv) RM44,000 for multiple facial bone fractures/multiple abrasion wounds; and (v) RM7,000 for scars. From the total of the assessed damages of RM163,000, a deduction of 20% overlapping factor was made and the final sum was RM130,000. The special damages awarded in the sum of RM82.30. The assessment of general damages was reasonable and ought not to be disturbed. (paras 117, 118-125, 129 & 130)

Case(s) referred to:

Henderson v. Foxworth Investments Ltd [2014] 1 WLR 2600 (UKSC) ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC ***(refd)***

Lilies Suraya Abdul Latib & Ors v. Khairul Sabri & Ors [2019] 1 LNS 2099 HC ***(refd)***

Majlis Bandaraya Petaling Jaya v. Digital Viva Sdn Bhd & Anor [2020] 3 CLJ 520 CA ***(refd)***

Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***

Ng Chul Sia v. Maimon Ali [1982] 1 LNS 95 HC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC ***(refd)***

Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***

Legislation referred to:
Road Traffic Rules 1959, r. 13(1)
Rules of Court 2012, O. 16 rr. 3(3), 7

For the 1st appellant/plaintiff - Shuroma Guha Thakurta; M/s Manjit & Co
For the 2nd & 3rd appellants/3rd parties - Sean Teh Weng Kim; M/s Sim & Sean
For the respondent/defendant - Jannu Babjan; M/s PR Manecksha & Assocs

Reported by S Barathi

JUDGMENT

Kenneth St James JC:

Prelusion

[1] There was a motor vehicle accident. Three children were out on the road on a motorcycle, at about 9.30pm, on a weeknight. The rider was a girl of 12 years old. The two pillion riders with her on the motorcycle were also minors.

[2] At a junction with traffic lights, they made a U-turn. When they made that U-turn, they collided with a car.

[3] One of the pillion riders filed a Sessions Court suit against the car driver. The driver brought a third-party suit against the father of the pillion rider who filed the suit, and against the father of the rider.

[4] The Sessions Court dismissed the pillion rider's suit. The Sessions Court found the driver not liable for the accident.

[5] The pillion rider appealed to the High Court. The two third parties (the fathers) joined in on the pillion rider's appeal. In other words, the three of them filed one notice of appeal, as co-appellants.

[6] In the High Court appeal proceedings, the driver objected to the fathers' appeals, submitting that as third parties, the fathers have to file separate appeals; that they cannot join in on the pillion rider's appeal. I allowed the objection and found that the fathers' appeals were defective.

[7] As for the pillion rider's appeal proper, I dismissed her appeal.

[8] The pillion rider applied for leave to appeal to the Court of Appeal. The two third-party-fathers also applied for leave to appeal to the Court of Appeal. This time, the two fathers filed a separate application for leave to appeal. The Court of Appeal granted the pillion rider and the two fathers leave to appeal.

[9] This judgment is written for the purpose of both appeals to the Court of Appeal. This judgment contains my reasons for allowing the driver's objections against the fathers' appeals from the Sessions Court (for conflating their appeals with the pillion rider's appeal). This judgment also contains my reasons for dismissing the pillion rider's appeal from the Sessions Court.

The Parties

[10] The pillion rider was the first appellant in the appeal before me. At the time of the accident, she was a minor. She was the plaintiff in the Sessions Court (P). The second appellant is her father. He was the first third party in the Sessions Court (TP1). The third appellant is the motorcycle rider's father. He was the second third party in the Sessions Court (TP2). The respondent was the car driver. She was the defendant in the Sessions Court (D).

[11] For ease of comprehension, I propose to refer to the parties as they appeared in the Sessions Court. The plaintiff (the pillion rider) is "P". The first third party (P's father) is "TP1". The second third party (the motorcycle rider's father) is "TP2". The defendant (the car driver) is "D".

[12] I will also refer to TP1 and TP2 together as "TP1TP2".

The Preliminary Objection Against TP1TP2's Appeals

[13] D raised a preliminary objection against the conflated notice of appeal. The notice of appeal was filed by P, TP1 and TP2. The three of them filed a single notice of appeal. D objected that the notice of appeal was defective, particularly, TP1TP2's appeals. D submitted that TP1TP2 could not file their appeals to the High Court using the same notice of appeal as P; that they must file separate notices of appeal.

[14] TP1TP2's reply to the objection was that:

(i) D had no objections to P's solicitors acting also for TP1TP2 in the Sessions Court suit; and

(ii) D suffered no prejudice by the combined appeals of P and TP1TP2.

[15] I found that these two replies missed the point of the objection. So, to determine D's objection, and to be procedurally fair to TP1TP2, I formulated a legal issue for the parties to submit on, with the objective that the answer to the legal issue would determine whether D's preliminary objection was allowed or not.

[16] The legal issue that I posed to the parties was – can third parties, in the first instance suit (here, the Sessions Court suit), who wish to appeal against the Sessions Court's judgment, join the plaintiff, who lost in the Sessions Court suit, to appeal against the Sessions Court's judgment? In other words, should the third parties have filed separate appeals?

[17] P submitted her answer to the issue posed. TP1TP2 submitted their answers too. I found both sets of answers to be of little assistance. Both sets of answers did not answer the issue.

[18] But I found D's answer to be of some assistance.

[19] My starting point was O. 16 r. 3(3) of the Rules of Court 2012 (ROC). It provides that a third-party notice is a writ, and the third-party proceeding is itself an action or suit. It also provides that in the third-party suit – a defendant who issues the third-party notice is a plaintiff, and the third-party is a defendant.

[20] The pertinent part of O. 16 r. 3(3) is set out here:

> **16 Third party and similar proceedings**
>
> **3. Issue, service of and entry of appearance to third party notice (O. 16 r. 3)**
>
> (1) The order granting leave to issue a third party notice may contain directions as to the period within which the notice is to be issued.
>
> (2) There shall be served with every third party notice a copy of the writ or originating summons by which the action was begun and of the pleadings, if any, served in the action.
>
> (3) Subject to paragraphs (1) and (2), [and other Rules] …, rule 3 shall apply in relation to a third party notice and to the proceedings begun thereby as if:
>
> (**a**) **the third party notice is a writ and the proceedings begun thereby an action;** and
>
> **(b) the defendant issuing the third party notice is a plaintiff and the person against whom it is issued a defendant in that action.**
>
> (emphasis added)

[21] Order 16 r. 7 of the ROC sheds further light on the issue. It provides that in a suit, which contains a third-party suit within it, judgment can be entered for the plaintiff against the defendant. And judgment can be entered for the defendant against the third-party.

> **7. Judgment between defendant and third party (O. 16 r. 7)**
>
> (1) Where in any action a defendant has served a third party notice, **the Court may** at or after the trial of the action or, if the action is decided otherwise than by trial, on an application, **order such judgment as the nature of the case may require to be entered for the defendant against the third party or for the third party against the defendant.**
>
> (2) Where in an action judgment is given against a defendant and judgment is given for the defendant against a third party, execution shall not be issued against the third party without the leave of the Court until the judgment against the defendant has been satisfied. (emphasis added)

[22] I then proceeded to seek guidance from cases which are known as third party proceeding authorities, such as: (i) *Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226, (ii) *United Merchant Finance Bhd v. Majlis*

Agama Islam Negeri Johor [1999] 2 CLJ 151; [1999] 1 MLJ 657, [1999] 2 AMR 1561; and (iii) *Majlis Bandaraya Petaling Jaya v. Digital Viva Sdn Bhd & Anor* [2020] 3 CLJ 520 (CA), [2020] MLJU 88.

[23] In *United Merchant Finance Bhd* (*supra*), the Federal Court, through Justice Mohamed Dzaiddin FCJ (later CJ), propounded (at p. 158 (CLJ); p. 662 (MLJ)) that:

> … third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v. Medical Superintendent General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC)).

[24] In *Majlis Bandaraya Petaling Jaya* (*supra*), the Court of Appeal, through Justice Suraya Othman JCA, enunciated:

> [29] As can be seen from a perusal of O. 16 rule 3 above, the whole concept of a third party proceedings is that it is an independent proceeding between a defendant as a plaintiff and a third party as a defendant. The defendant takes a third party proceeding against the third party to seek for contribution or indemnity in the event the defendant is found liable and it was not intended to be treated in the same way as an action between a plaintiff and a defendant. The effect is that, **a third party proceedings constitute a separate action between a defendant and a third party within the main action.** This proposition can be found in the case of *Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226, 228, where the Supreme Court held as follows:
>
> > **We also do not think that a proceeding under** O. 16 of the Rules of the High Court 1980 **is intended to be treated in the same way as an action between a plaintiff and a defendant.**
> >
> > **Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant** … (emphasis added)

[25] The principle that is propounded by these authorities, and applied here to the Sessions Court suit, was that the third-party proceeding was purely between D and TP1TP2. The third-party proceeding was a separate and distinct proceeding to determine TP1TP2's indemnity and contribution towards D's liability to P (if any).

[26] The foundation and structure of the judgment in the suit between P and D was the original dispute between P and D, namely P's suit for negligence against D. But the foundation and structure of the judgment in the suit between D and TP1TP2 was the third-party suit between D and TP1TP2, namely on the issue of indemnity or contribution by TP1TP2 towards the liability of D, if liability was found against D.

[27] Further, the Sessions Court (the trial court) could render judgment in the suit between P and D, and could separately render judgment in the suit between D and TP1TP2. So, TP1TP2 could appeal against the Sessions Court's judgment in the suit between D and TP1TP2, but TP1TP2 could not appeal against the Sessions Court's judgment in the suit between P and D.

[28] I was also guided by the case law authority of *Lilies Suraya Abdul Latib & Ors v. Khairul Sabri & Ors* [2019] 1 LNS 2099, [2020] 4 AMR 365 (HC), where Justice Wong Kian Kheong J (now JCA) held that:

> [11] I am of the view that the plaintiffs cannot appeal against SC's decision regarding the second to fourth TP. My reasons are as follows: (1) … third party proceedings are purely between the defendant and third party; (2) a plaintiff has no claim against a third party. Nor has a third party any counterclaim against a plaintiff. Hence, the trial court cannot decide on any matter between a plaintiff and third party; (3) if a trial court cannot decide on any matter between a plaintiff and third party: (a) the plaintiff cannot appeal against a trial court's decision regarding third party proceedings; and (b) the third party cannot file an appeal against any decision of the trial court in respect of the original action between the plaintiff and defendant …

[29] For these reasons, my findings on D's preliminary objection were:

(i) first-procedurally, it was not proper for TP1TP2 to join-up with P to lodge one combined appeal. Their respective causes and suits were separate from each other. The judgment between P and D was appealable by either P or D. Here, P appealed. The judgment between D and TP1TP2, however, was appealable by D or TP1 or TP2.

(ii) second-since the Sessions Court found no liability on the part of D *ie*, no judgment was entered for P against D, there was naturally no judgment for D against TP1TP2. There was no judgment for TP1TP2 to appeal against.

[30] And so, I held that TP1TP2's purported appeals, which were conflated with the sole notice of appeal that was lodged, were defective and incompetent. Effectively and procedurally, TP1TP2 had no appeals here.

[31] I therefore allowed the defendant's preliminary objection against TP1TP2's appeals. In allowing the defendant's preliminary objection against TP1TP2's appeals, the only appeal that remained for me to determine was P's appeal against the Sessions Court's judgment in the suit between P and D.

TP1TP2 Filed A Notice Of Appeal (To The Court Of Appeal) That Is Inconsistent With The Terms Of Their Motion For Leave To Appeal To The Court Of Appeal, And Inconsistent With The Terms Of The Order For Leave

[32] At this juncture, I need to point out several incongruities in the proceedings that TP1TP2 have thus far brought from the Sessions Court to the High Court, and now to the Court of Appeal.

[33] From the Sessions Court, TP1TP2 brought to the High Court purported appeals that conflated with P's appeal. It bears repeating that TP1TP2 and P filed one notice of appeal that was intended to capture their three respective appeals.

[34] D objected to TP1TP2's appeals. I heard the parties on D's objection and decided that TP1TP2's appeals, filed conflatedly with P's appeal, were defective and incompetent. My decision was that TP1TP2 did not have any appeal before me.

[35] As a result, I did not hear TP1TP2's purported appeals on the merits. I made no findings on liability or quantum against them.

[36] I also did not analyse, as an appellate court would, the Sessions Court's judgment as against TP1TP2, since there was effectively no judgment for D against TP1TP2. (The Sessions Court found D not liable to P.)

[37] TP1TP2's current appeal from the High Court to the Court of Appeal was premised on, and stemmed from, the order that I made on D's objection against TP1TP2 filing one conflated appeal together with P.

[38] As such, if TP1TP2 wanted to appeal against my decision, it must be against my decision on D's objection, which was my decision that their purported appeals from the Sessions Court were defective and incompetent.

[39] However, when I perused TP1TP2's cause papers in their motion for leave to appeal to the Court of Appeal (in Court of Appeal Motion No. P-08-437-12-2022), it appeared to me that TP1TP2 applied for leave to appeal against the decision that I made against them, purportedly on liability. But I did not make such a decision. I did not make a decision on TP1TP2's liability.

[40] But TP1TP2's notice of motion in the Court of Appeal prayed for leave to appeal against my purported decision that dismissed their appeals on the issue of liability ("merayu terhadap keseluruhan keputusan … Mahkamah Tinggi … yang telah menolak rayuan pemohon-pemohon (TP1TP2) atas isu liabiliti").

[41] And in TP1TP2's affidavit in support of the motion for leave to appeal to the Court of Appeal – which I must point out, was affirmed not by either or both of them, but by their solicitor-averred to the issue of liability in the third-party suit between D and TP1TP2. But I did not decide on the issue of liability between D and TP1TP2.

[42] It was therefore my opinion that TP1TP2's appeal to the Court of Appeal could not, or should not, be against my decision on liability, as I did not make such a decision. My decision, as against TP1TP2, was that their conflated appeal from the Sessions Court was defective and incompetent (as a result of D's objection against the propriety of TP1PT2's conflated appeal).

[43] In other words, my decision was that TP1TP2's appeal from the Sessions Court was defective and incompetent. But their motion in the Court of Appeal was for leave to appeal against my decision against them purportedly on liability. This was the first incongruity.

[44] There was a second incongruity. The second incongruity was between the terms of the motion for leave (what they prayed for) and the terms of the Court of Appeal order that were drawn up and filed by TP1TP2. In their motion for leave to appeal, TP1TP2 prayed for leave to appeal against my decision on liability (which I did not make). But in the Court of Appeal order granting TP1TP2 leave to appeal, TP1TP2 were granted leave to appeal against my decision which purportedly dismissed their appeals on liability, and, additionally, on quantum as well (which was in fact not prayed for in their motion for leave) ("yang telah menolak rayuan pemohon-pemohon (TP1TP2) atas isu liability dan kuantum").

[45] The terms have changed. The width of the leave to appeal was increased. TP1TP2 prayed for leave to appeal against my decision on liability. But the leave order stated that leave was granted to appeal against my decision on liability and quantum. This was the second incongruity.

[46] Then there was a third incongruity. TP1TP2 filed a notice of appeal – encl. 108 in the High Court file – that stated that they now appeal against my decision on D's preliminary objection against TP1TP2's conflated appeal, and on liability, and on quantum.

[47] The terms have changed again. The width of the leave to appeal increased further. TP1TP2 appeared to keep adding to the terms of their leave to appeal. They applied to the Court of Appeal to appeal against my decision against them, purportedly on liability (when I did not actually make a decision against them on liability). The Court of Appeal granted them leave to appeal. They drew up and filed a leave order that stated that they had leave to appeal against my decision against them on liability and quantum.

[48] When they eventually filed their notice of appeal, the notice of appeal stated that they now appealed against my decision against them on liability, and against my decision against them on quantum (which was also a decision that I did not make against them), as well as against my decision on D's objection against their conflated appeal.

[49] It is my opinion that regardless of whether TP1TP2 and their solicitors changed the terms (the scope) of their leave to appeal – inadvertently or intentionally – what they appeared to have done was inappropriate.

[50] Also, I do not think that TP1TP2 obtained the leave of the Court of Appeal to appeal against my decision on D's objection, which led to my decision that TP1TP2's conflated appeal from the Sessions Court to the High Court was defective and incompetent.

[51] In effect, TP1TP2 did not get leave to appeal against the decision that I actually made against TP1TP2.

[52] In the circumstances, I would like to emphasise that this judgment, as against TP1TP2, contains only my reasons for deciding that TP1TP2's purported appeals from the Sessions Court to the High Court were defective and incompetent. This judgment does not contain any grounds that relate to dismissing TP1TP2's purported appeals from the Sessions Court to the High Court on the merits – neither on liability nor on quantum.

The Law On Appellate Intervention – The "Plainly Wrong" Test

[53] I then proceeded to opine on P's appeal from the Sessions Court, on liability and quantum. I considered the issues that arose before the Sessions Court and the resultant judgment of the Sessions Court.

[54] Siting as an appellate court, I should only interfere to disturb the findings of the first instance court, here: the Sessions Court Judge (SCJ), if the SCJ was "plainly wrong" in her decision.

[55] The Federal Court, in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 (FC); [2020] 8 AMR 227, through Justice Zabariah Mohd Yusof FCJ, comprehensively expounded the genesis of the "plainly wrong" principle, through its development, into its current meaning.

[56] *Ng Hoo Kui* (*supra*) propounded that the primary "plainly wrong" principle, includes the following elaborative principles:

(i) the SCJ's decision here would be "plainly wrong", if it was arrived at through "no or insufficient judicial appreciation of the evidence": referring to *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2010] MLJU 2179 (FC); [2011] 1 AMCR 338.

A (ii) this phrase of the "lack of judicial appreciation of the evidence" encompasses these three errors:

(a) critical factual finding which has no basis in evidence (findings not based on the evidence);

B (b) demonstrable misunderstanding of the relevant evidence (misunderstanding the evidence);

(c) demonstrable failure to consider the relevant evidence (failure to consider the evidence).

C (iii) the SCJ's decision would be "plainly wrong", if it was arrived at through a "material error of law": following *Henderson v. Foxworth Investments Ltd* [2014] 1 WLR 2600 (UKSC).

(iv) the SCJ's decision would be "plainly wrong", if it "could not reasonably be explained or justified", making it a decision "which no reasonable D judge could have reached": *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177 (FC); [2018] 1 AMR 517.

(v) as the appellate court, I was to evaluate whether the SCJ's decision was "reasonably made".

E **[57]** However, the "plainly wrong" principle is not intended to be used as a catch-all method to replace the SCJ's decision with my own (the appellate court's) decision, on the facts of the case. The Federal Court in *Ng Hoo Kui* (*supra*) put it this way:

F [76] What is pertinent is that, the 'plainly wrong' test **is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.**

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra* an appellate court **should not interfere with the factual findings of a trial judge unless it was satisfied that** the decision of the G trial judge was 'plainly wrong' where **in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.** If the decision did not fall within any of the aforesaid category, it is irrelevant, **even if the appellate court** thinks that with whatever degree of certainty, it **considered that it would have reached a different conclusion from the trial judge.**

H (emphasis added)

[58] Put differently – even if an appellate court finds, on the evidence and the facts of a case, that it would have come to a different decision, the appellate court should not by-pass an analysis of the first instance court's reasoning when it is deciding on the appeal.

I

[59] In other words, I must not make my own findings and substitute the SCJ's judgment with my own judgment. Instead, I must evaluate the SCJ's reasoning and decide if the SCJ's judgment was reasonably arrived at. Or, conversely, decide if the SCJ's judgment was unreasonably arrived at *ie*, the SCJ was "plainly wrong", which would call for me to interfere.

[60] I therefore consider the SCJ's appreciation of the evidence, and her application of the law, in the context of these elaborative principles, to see if the SCJ's judgment was "plainly wrong".

Liability

It Is P's Burden To Prove D's Negligence

[61] I found that the SCJ correctly applied the principle of law that in this negligence suit, the burden was on P to prove that D was negligent. Put differently, it was not D's burden to prove that D was not negligent. It was for P to prove that D was negligent.

[62] The SCJ cited the Federal Court case of *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151; [1971] 2 MLJ 175 (FC), which enunciated that:

> **In a negligence action the onus of proof rests wholly on the plaintiff,** whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence … (emphasis added)

[63] The SCJ also cited the High Court case of *Ng Chul Sia v. Maimon Ali* [1982] 1 LNS 95; [1983] 1 MLJ 110 (HC), which held (at MLJ p. 111) that:

> *… When an accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.* (emphasis added)

The Trial Judge Should Consider Which Version Is Inherently Probable

[64] I also found that the SCJ correctly applied the principle that where there were conflicting versions of the facts of a case (here: how the accident happened), the trial judge's approach was to consider which of the two conflicting versions was inherently probable.

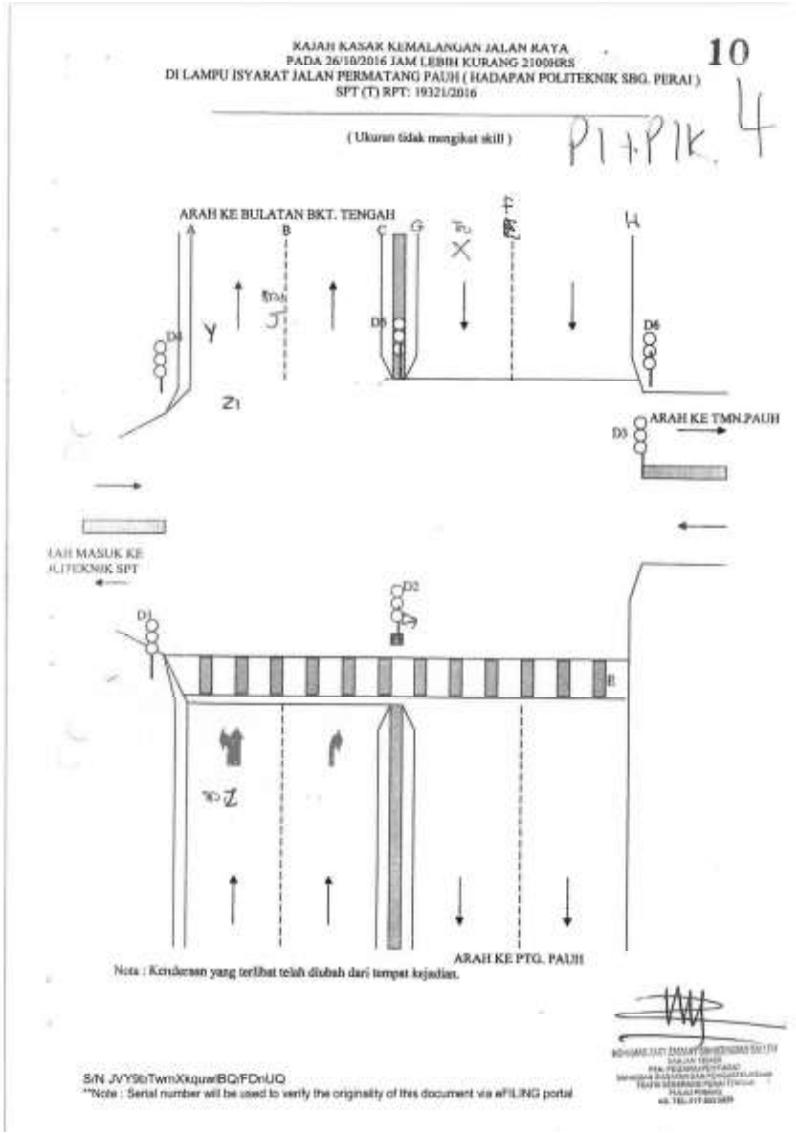
[65] The SCJ cited the High Court case of *Noorianti Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545; [1990] 2 MLJ 242 (HC), which propounded (at p. 549 (CLJ); pp. 243 to 244 (MLJ)) that:

> It is useful to pause here for a moment to say a few words regarding the approach which a trial judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses of one party was unshaken or unbroken is not *per se* an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration – see for instance *Muniandy & Ors v. PP* [1966] 1 MLJ 257, *Dato Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232 at p. 247 and *PP v. Neoh*

Wan Kee [1985] 1 MLJ 368 at p. 372. It has also been said that *a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable* – see for instance *Koay Teik Choo & Ors v. R* [1956] MLJ 52. With these principles in mind I shall now assess the evidence in the present case. (emphasis added)

The SCJ Found D's Version Of The Facts Inherently Probable

[66] I reproduce here the sketch plan that was produced and referred to at the trial:


KAJIAN KASAK KEMALANGAN JALAN RAYA
PADA 26/10/2016 JAM LEBIH KURANG 2100HRS
DI LAMPU ISYARAT JALAN PERMATANG PAUH (HADAPAN POLITEKNIK SBG. PERAI)
SPT (T) RPT: 19321/2016
(Ukuran tidak mengikut skill)
10
ARAH KE BULATAN BKT. TENGAH
ARAH KE TMN.PAUH
ARAH KE PTG. PAUH
Nota : Kenderaan yang terlibat telah diubah dari tempat kejadian.
S/N JVY9bTwmXkquwlBQrFDnUQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

11

KUNCI RAJAH KASAR KEMALANGAN JALAN RAYA
PADA 26/10/2016 JAM LEBIH KURANG 2100 HRS
DI LAMPU ISYARAT JALAN PERMATANG PAUH (HADAPAN POLITEKNIK SBG. PERAI)
SPT (T) RPT: 19321/2016

PENGENALAN HURUF :-

A - BAHU JALAN SEBELAH KIRI ARAH KE BULATAN BUKIT TENGAH.
B - GARISAN PUTIH PUTUS-PUTUS PEMBAHAGI LORONG.
C - TEBING BATU PEMBAHAGI JALAN
D1-D6 - LAMPU ISYARAT.
E - LINTASAN PEJALAN KAKI.

UKURAN JARAK :-

A KE B = 3.50 METER
B KE C = 3.50 METER

7.00

S/N JVY9bTwmXkquwBQ/FDnUQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[67] There were two conflicting versions of how the accident occurred. P's version relied on the testimony of the motorcycle rider: Aqilah (SP2).

P's Version

[68] The SCJ found that SP2's version included the following assertions:

(i) she was riding her father's (TP2's) motorcycle from point "X", down towards the traffic lights at "D5";

(ii) at the "D5" traffic lights, when the lights were green, she made a "turning onto her right-hand side" across to "lane AB";

(iii) D "hit the rear side of the motorcycle";

(iv) the "point of impact" was at "Y", on the left-side of lane AB, which infers that SP2 had completed the U-turn before she was hit from the rear.

[69] Please note that the words or phrases placed in inverted commas are taken from the SCJ's grounds of judgment.

[70] The SCJ found that there were unfavourable facts about SP2 that related to the merits of the suit, which included these findings:

(i) SP2 was only 12 years old at the time of the accident, and she ferried, not one, but two other 12-year-old girls on TP2's motorcycle which was meant to be ridden by an adult. SP2 did not have a licence to ride a motorcycle. The SCJ found that she "could not be a competent rider", and that she could not have the "ability to properly appreciate what the traffic signals could mean", so as to observe them and abide by them.

(ii) the SCJ found that SP2 "had mistook (*sic*) the traffic lights signal and miscalculated that there was ample time to make a U-turn". It was "evident" to the SCJ that SP2 "was not competent at all to ride a motorcycle", and that "she had no business to be on the road". The SCJ found that SP2 "was a trespasser and a danger to other road users".

(iii) in her police report (made in 2016), SP2 stated that as the traffic lights were green, she straightaway made a U-turn. And suddenly her motorcycle was hit by D's car ("saya dapati lampu isyarat hijau dan terus membuat pusingan "U", tiba-tiba m/sikal saya telah dilanggar"). In other words, her motorcycle was hit while she was making the U-turn.

(iv) but at the trial (in 2019), SP2 testified that she had "completed making the U-turn", such that the motorcycle and D's car were travelling in the same direction when the motorcycle was hit directly from the rear. SP2 was attaching blame solely on D.

(v) the SCJ found SP2's oral testimony at trial (that both vehicles were going in the same direction and she was hit directly from the rear) to be "not in line with" her police report narrative that the motorcycle was hit while she was making the U-turn.

(vi) the SCJ found that SP2's oral testimony at trial "reversed her stated direction of travel" in "an attempt to portray the case" as a case of "rear vehicular collision", rather than a case of SP2 crossing into D's right of way when she was doing the U-turn.

(vii) also, the SCJ pivotally found that SP2 made an "illegal U-turn in the face of oncoming traffic".

[71] A U-turn breaches the Road Traffic Rules 1959. Rule 13(1) is set out below:

> Section 13 U turns
>
> (1) … **no driver of any motor vehicle** whilst being driven on any road **shall cause his motor vehicle to be turned in such a manner that it is made to face the opposite direction** unless either:
>
> (a) he shall have first negotiated a round-about; or
>
> (b) such turn is permissible by virtue of the road sign No. 34E, Traffic Signs (Size, Colour and Type) Rules 1959 [L.N. 167/1959]

[72] The SCJ found that SP2 was "not a credible witness", who "obviously wanted to shift the blame" to D.

[73] The SCJ found SP2's evidence to be "inconsistent, variable, contradictory and unreasonable", and "not corroborated by the silent evidence".

[74] Further, the SCJ looked unfavourably at the fact that SP2 lodged her police report as late as two months after the accident. The accident happened on 26 October 2016. SP2 lodged her police report on 22 December 2016. The SCJ found that this delay did not assist P's case.

[75] To support her finding, the SCJ cited the Federal Court case of *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61; [1975] 1 MLJ 119 (FC), which held (at MLJ p. 121) that:

> … In the familiar case where a police report is admitted under the law, it is necessary that it should have been made before police investigation has commenced. The reason for this is that this class of statement is admitted upon the principle that it is the natural effusion of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. *The main test as to whether there has been a delay in making the report is whether it was made as early as can reasonably be expected in the circumstances of the case and before there is opportunity for tutoring or concoction.*

A *This, in my opinion, is also a circumstance tending to affect a witness's impartiality,* hence his veracity which must be taken into account in arriving at a decision … (emphasis added)

[76] The SCJ found that this two-month delay to lodge her police report was unsatisfactorily explained because SP2 suffered only minor injuries – B "abrasion on both arms and dislocated ankles". The SCJ found that the delay in lodging SP2's police report "affected the accuracy or veracity of the report".

D's Version

C **[77]** In contrast, the SCJ found that D's version included the following facts:

(i) D lodged her police report within 24 hours of the accident;

(ii) in her police report, D stated that as she crossed the main traffic lights junction, the motorcycle from the opposite direction suddenly made a D U-turn. D could not avoid colliding with the motorcycle at the rear portion ("tiba-tiba sebuah m/sikal … datang dari arah hadapan terus membuat pusingan U secara mengejut. Saya tidak sempat mengelak lalu melanggar m/sikal tersebut di bahagian belakang");

E (iii) the point of impact was at "J", on the right side of lane AB, which infers that the motorcycle had not yet completed the U-turn before D's car collided with it.

[78] The SCJ found facts that were favourable for D which related to the merits of the suit, which included these findings:

F (i) D was "forced to take appropriate evasive action by swerving to her right", in an endeavour to avoid colliding with the motorcycle.

(ii) D's car hit the motorcycle "slantwise at the rear".

[79] This finding was supported by the evidence of the damage to the G respective vehicles. The investigating officer (IO) testified that for the motorcycle, the damage was "both to its front and rear portions". The IO listed the damage to the motorcycle to include – "lampu belakang pecah", "nombor plat belakang pecah", "cover set belakang pecah", "rim tayar belakang pecah", "lampu isyarat kiri kanan depan pecah".

H **[80]** As for D's car, the IO listed the damage to include – "lampu depan besar kiri peach", "bumper hadapan kiri pecah", "mudguard depan kiri pecah", and "bonet depan hadapan kemek". So the damage to D's car "was on all its front left side".

I **[81]** The damage to D's car, particularly, did not support SP2's version that the two vehicles were moving in the same direction, and D's car hit the motorcycle directly from the rear.

[82] Instead, the damage to D's car supported D's version that the motorcycle "cut across" D's "right of way", causing D to evasively swerve to the right to avoid colliding with the motorcycle, but the front left side of D's car hit the motorcycle at an angle.

[83] The SCJ found D's version to be "inherently probable". Consequently, the SCJ found that P had failed to prove, on the balance of probabilities, that D was negligent.

Summary On Liability

[84] I found that in her grounds of judgment, the SCJ evaluated the oral evidence, with particular focus on the two main protagonists in this matter, namely D and the then 12-year-old motorcycle rider: SP2 (who was still only 15 when she testified in 2019). The SCJ also evaluated also the documentary evidence: the respective police reports and the sketch plan. The SCJ evaluated the physical evidence, such as the nature and extent of the damage to the motorcycle and D's car.

[85] The SCJ was in the position to hear, observe and assess not only the witnesses' demeanour, but also their credibility, and the cogency of their testimonies. The SCJ was able to check the oral evidence against the documentary evidence and the physical evidence.

[86] The SCJ's conclusions included:

(i) the D's version was inherently probable;

(ii) D's oral testimony was consistent with her police report, which was lodged within a day after the accident. That version was that as D drove her car through the main intersection, the motorcycle ridden by SP2, made a U-turn from the opposite direction, cut across D's path and caused the collision. D's car hit the motorcycle at an angle. The damage to the car was all on the front left side;

(iii) in contrast, SP2's oral testimony was not consistent with her police report, which was incidentally lodged two months after the accident. In her police report, SP2 stated that her motorcycle was hit while she was making the U-turn. But in her oral testimony at trial, she said that she was hit squarely from the rear; while she was travelling in the same direction as D.

[87] The SCJ found that SP2's evidence was "inconsistent, variable, contradictory, and unreasonable".

[88] The SCJ found that D was not negligent. Rather, it was SP2 who caused the accident which resulted in P's injuries.

P's Arguments

[89] I now proceed to address P's arguments that were canvassed before me or canvassed before the SCJ – not arguments that were not canvassed before me or not canvassed before the SCJ – since it would be unfair for me to have evaluated the SCJ's judgment on arguments not canvassed before her, and similarly for my judgment here to be evaluated on arguments that were not canvassed before me.

[90] P mounted several arguments in this appeal. The first argument worth noting was that P argued that the SCJ delivered three different judgments. The first judgment was purportedly delivered in open court on 29 August 2019. The second judgment was purportedly conveyed to D's solicitors after P's solicitors had left the courtroom, also on 29 August 2020. The third judgment was the SCJ's written grounds of judgment.

[91] I found this argument to be untenable. The only judgment that the SCJ delivered, with reasons stated, was contained in the SCJ's grounds of judgment. I did not see how P could be mistaken or confused as to the terms of the SCJ's judgment. And that was the SCJ's judgment that I was to evaluate in this appeal.

[92] Second, P argued that as D did not state in her police report that the traffic lights were green in her direction, it was fatal to D's case.

[93] I found this argument meritless as well. P was arguing about what D did not state in her police report. That went to the issue of D's evidence. D was not bound by the statements in her police report, unlike the averments in her pleadings, by which she was bound.

[94] Further, the content of D's police report was evidence of D's prior statement about the fact of the accident and the facts surrounding the accident. The burden was on D to prove those facts. Just as it was P's burden to prove the facts stated in SP2's police report.

[95] Third, P argued on behalf of TP1TP2 that they should not be made liable at all because they did not know that their children had gone out riding on TP2's motorcycle. I believed that was the SCJ's very point against TP1TP2 – that they were in dereliction of their duty of care as guardians. The children under their care had taken out TP2's motorcycle. The rider: SP2 rode with not one but two pillion riders, making a U-turn that the IO testified that they should not have made.

[96] The SCJ found that in TP1's (P's father) testimony, TP1 was "regretful" that P slipped out of the house for the ride on the motorcycle "without prior permission".

[97] The SCJ also found that P "failed to heed" TP1's advice not to take a ride on another person's motorcycle. The SCJ found that P suffered her injuries "partly of her own fault".

[98] In other words, P failed to use reasonable care for her own safety. A

[99] As for TP2 (SP2's father), the SCJ found that TP2 had a "permissive habit" of leaving the motorcycle keys at the door, which SP2 could easily take.

[100] In essence, the SCJ found that P failed to satisfy her burden to prove that D was negligent. The SCJ found that it was SP2 who caused the accident. The SCJ found that D was not liable to P. B

[101] Since the SCJ found that D was not liable to P, it was academic for the SCJ to set out her views about who was responsible for causing the accident. Even though there may have been no need for the SCJ to set out these findings, the SCJ proceeded to apportion liability and give her views about contributory negligence. C

[102] The SCJ opined that P was 25% "liable", *ie*, 25% contributorily negligent; TP1 was 25% liable *ie*, 25% contributorily negligent; and TP2 was 50% liable *ie*, 50% contributorily negligent. I could comprehend the SCJ's findings. The SCJ found that P and her father (TP1) 50% at fault, and similarly SP2 and her father (TP2) the balance 50% at fault. But since SP2 was not a party to the suit, the SCJ placed the balance 50% wholly on TP2. D

[103] Even though there may have been no need for the SCJ to set out these apportionments of liability, I found that for completeness, these percentages of liability could be useful. E

[104] This was because the SJC wrote her grounds of judgment for this appeal. This proceeding before me was an appeal proceeding. The SCJ found D completely not liable. But, if I were to disagree with the SCJ's findings on liability – for example, that D is completely liable, or that D is contributorily negligent – the SCJ would then have set out findings of apportionment of liability or contributory negligence that I could consider, to render a judgment with different percentages as to liability. F

The SCJ's Findings On The Liability Of TP1TP2 – Does This Make The SCJ Plainly Wrong? G

[105] In the SCJ's apportionment of liability, the SCJ found P 25% contributorily negligent, and apportioned 25% liability to TP1 and 50% to TP2. Even though this was not in line with the principle that the third-party proceeding was a separate suit between D and TP1TP2 (as distinct from the suit between P and D), it was my view that the SCJ's reasoning here did not necessarily make the SCJ "plainly wrong", or that the SCJ committed a fundamental error in her judgment in P's suit against D. H

[106] I could understand the SCJ's rationale. The SCJ found D not liable at all. That meant that D was "0% liable" to P. Out of the 100% liability, the SCJ apportioned liability to P, and TP1TP2. The SCJ "apportioned" liability, even though there was no need for the SCJ to do so. The SCJ apportioned 25% to P, 25% to P's father: TP1, and 50% to SP2's father: TP2. I

[107] To my mind, the effect of the SCJ's finding that P was 25% "liable", that TP1 was 25% liable, and that TP2 was 50% liable for P's injuries-was that D was not at all liable to P, in P's suit against D. Ultimately, regardless of the terminology used – "liable" or "contributorily negligent" or "fault" – the net result of the SCJ's rationale was that D was not at all liable to P.

[108] But I must point out that in P's suit against D, there was no issue of TP1TP2's liability to P. In P's suit against D, there should only be the issue of D's liability to P.

[109] The issue of TP1TP2's liability to D was in the third-party proceedings, which was, as pointed out earlier, the suit between D and TP1TP2.

[110] So, the question to consider was – when the SCJ found no liability by D to P, but yet attributed liability and contributory negligence to P and TP1TP2, was the SCJ "plainly wrong"? In my view, this rationale does not make or render the SCJ's judgment (and the grounds of her judgment) – that D was not liable to P – "plainly wrong".

[111] I found that the SCJ's apportionment of liability in this manner did not make the SCJ "plainly wrong" in her judgment. The SCJ straightforwardly found D not liable at all to P.

[112] The SCJ weighed and evaluated all the surrounding circumstances on how the car collided with the motorcycle at an angle; that the car did not hit the motorcycle directly or squarely at the rear. The car and the motorcycle were both in motion. At the instant that D saw the motorcycle, her reflexes would have sprung into action to move the car, to evade hitting the motorcycle. The pivotal fact was that the car collided with the motorcycle at an angle.

[113] I found that the SCJ's appreciation of the evidence and the surrounding factors was fair and balanced.

[114] I was not prepared to overturn the SCJ's judgment in P's negligence suit against D, on this ground. I did not think that it is just and fair to do so, particularly since I found that the SCJ had appreciated and evaluated the relevant evidence that related to the merits of P's suit against D.

The Terms Of The Judgment Dated 29 August 2019

[115] When I looked at the SCJ's judgment dated 29 August 2019, I found that the SCJ did not hold TP1TP2 liable to D, nor to P. The terms of the judgment stated that:

(i) the SCJ dismissed P's suit against D *ie*, the SCJ decided on liability;

(ii) the SCJ assessed general damages at RM130,400 and special damages at RM82.30 *ie*, the SCJ decided on the quantum of damages; and

(iii) the SCJ awarded costs at RM11,297 *ie*, the SCJ computed the costs.

[116] In effect, the SCJ's judgment was a judgment only in P's suit against D. There was, in fact, no judgment in the third-party suit between D and TP1TP2. The SCJ made no judgment in D's third-party suit against TP1TP2.

Quantum

General Damages

[117] I found the SCJ's judgment on quantum to be reasonable. In her grounds of judgment, the SCJ set out a comparison table of:

(i) the amount prescribed by the compendium,

(ii) the amount proposed by P, and

(iii) the amount proposed by D

– for each of the five "headings of injury". The SCJ then decided on an amount against each heading of injury. I found that there was nothing fundamentally flawed or erroneous in this method and in her findings.

[118] I would like to suggest to the parties that the SCJ's grounds of judgment be included in the record of appeal, so that it can be referred to in the current two appeals to the Court of Appeal. This is so that the SCJ's comparison table can be analysed.

[119] Briefly, under the first heading of injury of "bilateral eyes periorbital haematoma, left eye traumatic mydriasis, chemosis of both eyes", the compendium prescribed damages for the same or similar injuries at RM10,000-RM20,000. P proposed RM80,000. D proposed RM9,000. The SCJ assessed it at RM9,000.

[120] Under the second heading of injury of "multiple skull bone fractures", the compendium prescribed damages for the same or similar injuries at RM10,000 to RM15,000. P proposed RM35,000. D proposed RM33,000. The SCJ assessed it at RM33,000.

[121] Under the third heading of injury of "multiple head injuries", the compendium prescribed damages for the same or similar injuries, broken down into component injuries, which added up to the aggregate range of RM110,000 to RM165,000. P proposed RM250,000. D proposed RM70,000. The SCJ assessed it at RM70,000 (because P's head injuries "healed well and no medications (are) needed").

[122] Under the fourth heading of injury of "multiple facial bone fractures/ multiple abrasion wounds", the Compendium gave examples of the same or similar injuries in various amounts of damages. P proposed an aggregate of RM93,000. D proposed an aggregate of RM44,000. The SCJ assessed it at RM44,000 (with a reference to two case law authorities).

[123] Under the fifth heading of injury of "scars", the compendium prescribed damages for the same or similar injuries in various amounts. P proposed RM10,000. D proposed RM7,000. The SCJ assessed it at RM7,000 (again with a reference to two case law authorities).

[124] As can be seen, the SCJ accepted D's proposal and submissions for each heading of injury. The SCJ was not "plainly wrong" for doing that.

[125] The SCJ assessed damages at RM163,000. The SCJ then deducted a 20% "overlapping" factor and arrived at a final sum of RM130,400.

[126] P argued that the SCJ should not have deducted 20% from the sum of general damages for overlapping. P argued that P's injuries were all over her body, and for this reason, there should not be any deductions for overlapping at all.

[127] But P's injuries were, in fact, concentrated at the head – the eyes, the skull bone fractures, the head injuries, the facial bone fractures and wounds. The SCJ was not "plainly wrong" to have deducted 20% for overlapping.

[128] P further argues that the SCJ did not follow the current trend for damages for the injuries concerned. But P did not demonstrate how or in what manner the SCJ's assessment of general damages completely or substantially departed from the current trend. It remained an unsubstantiated argument.

[129] In summary, as I found that the SCJ's assessment of general damages was reasonable, I did not disturb the SCJ's exercise of her discretion over damages.

Special Damages

[130] Another point of contention was special damages. The SCJ awarded the sum of RM82.30 as special damages. P argued that the parties had earlier agreed to the sum of RM619.80 as special damages, and so the SCJ had committed a fundamental error.

[131] I found P's argument untenable. First, again in her grounds of judgment, the SCJ set out a table of special damages and costs. For special damages, out of 16 items of special damages and costs, the only item of special damages that was recorded by the SCJ as "agreed" was the sum of RM82.30, not RM619.80 (as alleged by P).

[132] Second, at the hearing of the appeal, P did not show me where in the notes of evidence or the notes of proceedings that the parties had agreed to the sum of RM619.80 and informed the SCJ to record this allegedly agreed sum of special damages.

Conclusion

[133] Applying the elaborative principles for appellate intervention to this appeal, I did not find that the SCJ's analysis of the evidence, and her conclusion on the evidence, to be "plainly wrong"; or fundamentally erroneous; or that the SCJ did not sufficiently appreciate the evidence; or that the SCJ made a material error of law; or that the SCJ's decision was not reasonably made.

[134] Rather, I found that the SCJ's evaluation of the evidence to be sound and reasonable.

[135] And so, I did not disturb or interfere with the SCJ's judgment, that D was not liable to P for negligence.

[136] For these reasons, I allowed D's objection and dismissed TP1TP2's conflated appeal with costs of RM5,000 each to be paid by TP1TP2 to D, and I dismissed P's appeal with costs of RM5,000 to be paid by P to D. Costs are subject to the allocator.